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IN THE

Supreme Court of the United States

October Term, 1964.

No. 717.

LEWES DAIRY, INC.,
Petitioner,

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioner, Lewes Dairy, Inc., asks that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in its consolidated cases Nos. 14,642 and 14,643.

OPINIONS BELOW.

The opinions rendered in the proceedings before the Secretary of Agriculture are printed in an appendix. Appellants' App. 173a and 210a.[1] The opinion of the District Court on review is unreported and is in an appendix. Appellants' App. 221a. The opinion of the Court of Appeals is as yet unreported and is appended. Petition's App. 1a.

JURISDICTION.

The judgments of the Court of Appeals sought to be reviewed were dated and entered October 6, 1964, in both Nos. 14,642 and 14,643. Petition's App. 11a, 12a. The jurisdiction to review these judgments by writ of certiorari is conferred upon this Court by 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether a milk order violates the prohibition against economic trade barriers contained in the Agricultural Marketing Agreement Act of 1937 when, as a consequence of a dairy's introducing some portion of its milk into the regulated market, the order extends the regulatory exactions of that market to all the dairy's business, including the more substantial business it does in an unregulated area where competing sellers are not required to suffer those regulatory exactions?

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1. This refers to pages of the Appellants' Appendix in the Court of Appeals, nine copies of which are filed herewith. The Appellee's Appendix in that Court, nine copies of which are also filed, will be similarly described herein, and the appendix hereto will be designated "Petition's App."

STATUTE AND REGULATION INVOLVED.

The statute is § 8c of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 247,[2] 7 U. S. C. § 608c. The regulation, promulgated by the Secretary of Agriculture under that Act, is Milk Marketing Order No. 127, 24 Fed. Reg. 11071 *et seq.* (1959), now designated Order No. 16, 7 C. F. R. § 1016. Set forth in appendices is the text of the statute (Petition's App. 16a) and the Milk Order (Appellants' App. 112a).

Because the provisions of the entire Milk Order are so inter-related, critical sections cannot be meaningfully extracted. The important subsection of the statute is (5)(G), 7 U. S. C. § 608c(5)(G):

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

In *Lehigh Valley Cooperative Farmers, Inc. v. United States,* 370 U. S. 76, 97 (1962), this Court ruled:

> ". . . [Subsection](5)(G) was compendiously intended to prevent the Secretary from setting up, under the guise of price-fixing regulation, any kind of economic trade barriers, whether relating to milk or its products."

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2. As amended by 50 Stat. 563, 52 Stat. 215, 53 Stat. 793, 56 Stat. 85, 61 Stat. 951, 61 Stat. 707, 710, 62 Stat. 1258, 63 Stat. 282, 68 Stat. 907, 75 Stat. 304, 305, and 76 Stat. 632.

STATEMENT OF THE CASE.

Here attacked, as an economic trade barrier, is that system employed in current milk orders which penalizes a dairy for introducing some portion of its milk into a regulated market by providing, as a consequence, that the exactions of the regulated market will extend to all the dairy's business, including the more substantial business it does in an unregulated area where competing sellers are not subjected to the regulatory exactions.

1. *This Dairy's Operations:* Lewes Dairy, which here makes the attack, operates only one plant which is located in southern Delaware. Appellee's App. 25b. There it processes milk for consumption in fluid form. Appellee's App. 16b and 25b-27b. Lewes purchases that milk from farmers ("producers") located in downstate Delaware, except for supplemental supplies, ranging less than 35% of the total, which it buys from a Pennsylvania dairy (a "handler"). Appellee's App. 26b and 28b.

Lewes distributes the greater part of its production in downstate Delaware. Appellee's App. 27b. There it competes with local handlers which are unregulated, since the southern Delaware marketing area, where they do substantially all their business, is not the subject of a milk order. Appellee's App. 13b, 15b, and 16b. The balance of Lewes' production, which at one time comprised as much as 45% and has since approximated 35%, is distributed in the adjacent part of Maryland which is also on the Eastern Shore of the Chesapeake Bay. Appellee's App. 27b and 34b.

2. *This Order's Application to Such Operations:* Milk Marketing Order No. 127 provides that, as a consequence of the sales Lewes makes in the Maryland market which the Order regulates, Lewes' business is to be subject to full regulation, which means at the least that regulatory charges

are to be exacted upon all of Lewes' purchases of milk supplies.

The features of the Order which do this are similar to those now employed in nearly all market-wide orders promulgated by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937. Milk is classified according to the use made of it by handlers, and each class is assigned a price for regulatory purposes. Milk processed for consumption in fluid form is categorized "Class I." Milk which handlers use to make manufactured products such as cheese is designated "Class II" and is assigned a price less than that assigned to Class I milk. Order §§ 41 and 50, Appellants' App. 127a and 131a.

Full regulation under the Order is imposed upon each "pool plant" of a handler, which is defined as a plant utilizing most of its receipts in Class I form and disposing of as much as 10% in Class I form within "the marketing area." Order § 3(b)(1), Appellants' App. 118a. The marketing area is delineated as the State of Maryland, except for certain of its counties on the Western Shore. Order § 1(c), Appellants' App. 116a.

In regulating pool plants, three techniques are used. First, the Order directs that a "compensatory payment" be made to the Maryland market's "producer settlement fund" upon all milk purchased from another handler, such as Lewes' purchases from the Pennsylvania dairy, without regard to the price actually paid the other handler. Order § 62, Appellants' App. 135a (now revised in amount by Order dated July 22, 1964, 29 Fed. Reg. 10802, 10831 (1964), 7 C. F. R. § 1016). Next, it fixes a minimum price, known as the "blend", which must, at the least, be paid producers for all purchases from them; in effect, the blend is tantamount to a weighted average of the Class prices.[3] Finally, the Order requires a wholly Class I plant like

3. The blend price represents the average of the Class prices, weighted by the amount of producer milk actually utilized in each class by all pool plants during the period involved, and increased by

Lewes to make a payment, equal to the difference between the blend and the higher Class I price, into the Maryland settlement fund upon all producer purchases, regardless of whether competitive conditions had required the handler to pay producers more than the blend.[4]

In summary, because Lewes introduces a portion of its production into the regulated market, it is subjected to the Order's regulatory exactions upon all its purchases, in addition to being required to pay producers the blend price and as much more as its buying competition may require.[5]

3. *This Dairy's Attack Upon the Trade Barrier Effect of the Order:* Lewes' petition attacking the Milk Order was filed with the Secretary of Agriculture, under 7 U. S. C. § 608c(15)(A), on December 31, 1959. Appellants' App. 148a. As amended, it broadly assailed the Order for incorporating the Maryland Eastern Shore. Appellants' App. 152a. It contained other assertions, however, including allegations concerning "the undue, unfair, and discriminatory interference with commerce in milk" and the consequent "derogation of the purposes and policy of the Statute." Appellants' App. 169a.

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the quotient that results from dividing the compensatory payments received by the total amount of such producer milk. Order §§ 70 and 80, Appellants' App. 138a and 140a. For an illustration of this computation, see *Lehigh Valley Cooperative Farmers, Inc. v. United States,* 370 U. S. at p. 89, n. 14.

4. The Order does this by directing each pool plant periodically to contribute to or withdraw a payment from the Maryland fund, depending upon how its total utilization of producer milk at class prices balances out in comparison with the blend price. Order §§ 83-86, Appellants' App. 142a-143a. The purpose is to make each plant ultimately bear the Class price as a minimum for producer milk. The effect upon a Class I plant is to exact the blend-Class I differential on producer purchases. This is substantially the effect upon Lewes, although it does have some minor Class II utilization, as is shown by the periodic reports which form the basis for the enforcement of the Order in case No. 14,642.

5. Lewes was paying farmers approximately as much as the Class I price at the time the record here was made. Appellants' App. 132a and Appellee's App. 30b.

In June 1961 the petition was dismissed. Appellants' App. 210a. Lewes then sought review by filing suit against the Secretary in the Delaware District Court, under 7 U. S. C. § 608c(15)(B). Appellants' App. 213a. During those proceedings, in June of 1962, the decision of this Court issued in *Lehigh Valley Cooperative Farmers, Inc. v. United States,* 370 U. S. 76, explaining that subsection (5)(G) of the Act, 7 U. S. C. § 608c(5)(G), does prohibit a milk order from interposing economic barriers to trade between markets. The review suit thereafter proceeded, on motions for summary judgment filed by the Secretary and by Lewes, to focus upon the effect of *Lehigh.* Appellants' App. 221a. Concurrently, in a companion suit which had been filed by the United States under 7 U. S. C. § 608a(6), the government commenced pressing for full enforcement of the Order against Lewes. Appellants' App. 25a.[6]

The Secretary took the position that subsection (5)(G), as construed in *Lehigh,* did invalidate the amount the Order then prescribed as the compensatory payment charge upon Lewes' purchases from the Pennsylvania handler.[7] How-

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6. Lewes had been joined in the administrative petition by three Eastern Shore Maryland handlers and another Delaware handler, Hollybrook. Upon the petition's dismissal, the Maryland dairies sought review in the Maryland District Court; however, the *Lehigh* decision had no material bearing upon the suit of those dairies, whose business was confined to the regulated market, and their broad attack upon the Order was ultimately denied. See *United States v. Mills,* 315 F. 2d 828 (4th Cir. 1963), *cert. denied* 374 U. S. 832. Hollybrook joined Lewes in the Delaware suit. However, it went out of business in the course of the District Court proceedings. Petition's App. 3a. As to Hollybrook, those proceedings have not as yet been brought to a conclusion, and therefore the appeal from the District Court subsequently described above did not involve Hollybrook as a party, although the caption of the appeal was written to include Hollybrook and the Court of Appeals' opinion speaks of it as though it were a party.

7. Enforcement of this original charge against Lewes was thereafter abandoned. Appellee's App. pp. 3b. The revised charge subsequently prescribed by amendment to the Order is, however, being enforced. See p. 5, *supra.*

ever, the Secretary denied that the principle of *Lehigh* had any bearing upon the feature of the Order which loaded all Lewes' purchases with charges, as a consequence of a minor portion being resold in the regulated area; he urged, instead, that this regulatory system was justified by the earlier Court of Appeals decision in *Titusville Dairy Products Co. v. Brannan*, 176 F. 2d 332 (3rd Cir. 1949). Alternatively, the Secretary argued that the court was not entitled to determine this issue because, he contended, it had not been sufficiently raised in the previous administrative proceedings.[8]

The District Court issued an opinion in the review case which, after reciting that "[b]oth parties have moved for summary judgment, the basic facts being undisputed," decided that the principle of *Lehigh* did prohibit an order for one market from fully regulating a plant doing an inter-market business. Appellants' App. 221a. On the Secretary's appeal, the Court of Appeals reversed. Petition's App. 10a.

The appellate opinion found that Lewes had raised the point before the Secretary, saying that its claims "may be read broadly enough to include the 'trade barrier' issue." Petition's App. 9a. However, it ruled that the record was "without evidence to sustain the factual realities of the legal arguments directed toward the issue" and called for further proceedings before the Secretary in the light of this ruling. Petition's App. 9a. Moreover, in the consolidated enforcement case which had been appealed by the United States, the Court of Appeals directed that Lewes be compelled expeditiously to pay into the District Court registry certain back charges of $92,000 claimed to be due the Maryland settlement fund, in addition to the charges on its current business which Lewes was already

8. The Secretary's main brief in the Court of Appeals, a certified copy of which has been filed here, reflects his position up to that time.

paying into the Court registry. Petition's App. 2a-3a and 10a and Appellants' App. 46a.[9]

The Court of Appeals' mandates upon the judgments entered in the review and enforcement cases were ultimately stayed pending the conclusion of these certiorari proceedings, upon the condition that in the meantime Lewes meet a schedule of payments on the $92,000, which it is doing. Petition's App. 13a. This petition follows.

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9. Actually, a small portion of these charges go to an administrative assessment fund and a marketing services fund rather than to the producer settlement fund.

In any event, in the light of its decision in the review case, the District Court had deferred enforcement of the back charges, which had accumulated before the government commenced pressing the enforcement case. It still required payment of current charges into the Court registry pending appeals. 7 U. S. C. § 608c(15)(B) actually provides that "[a]ny proceedings brought pursuant to section 608a(6) of this title . . . shall abate whenever a final decree has been rendered in proceedings . . . instituted pursuant to this subsection (15)."

REASONS FOR GRANTING THE WRIT.

This case involves the standard form of milk order which, when applied to dairies having only one plant and doing some business inside and some business outside a regulated marketing area, erects an economic barrier that appears to violate the statutory prohibition explained in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U. S. 76 (1962). A prompt adjudication of the violation is nationally important. The opinion of the Court of Appeals disclaims any adjudication of the merits and yet does so on a ground that has the inevitable effect of declaring that no violation of the trade barrier prohibition is here shown.

1. *The Substantive Question Is Substantial:* In *Lehigh* this Court held invalid, as an economic trade barrier, the amount of a "compensatory payment" charge which an order levied upon milk sold in a regulated market by a handler whose sales in that area were not proportionately large enough to subject it to full regulation.[10] In so holding, the Court reviewed the legislative history showing that subsection (5)(G) of the Act was intended to preclude regulatory interference with the free movement of milk among marketing areas, except insofar as necessary to "put outside milk on an equal footing" with its selling competition in the regulated area (p. 97 of 370 U. S.); as a result, the Court found that the subsection "was compendiously intended to prevent the Secretary from setting up . . . any kind of economic trade barriers." Moreover, when the Secretary argued in *Lehigh* that the charge there involved should be sustained because the handler could have elected

10. Order No. 127 also levied a compensatory payment charge upon sales made in the regulated market by handlers not subject to full regulation, as well as upon purchases made for regulated plants from other handlers rather than producers. Order § 62(d), Appellants' App. 136a.

full regulation as an alternative, the Court ruled that this election "was not voluntary" and "was coercive and, indeed, no election at all" (p. 99 of 370 U. S.).

More recently, in *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U. S. 361 (1964), where a Commerce Clause violation was found in a state milk regulation which denied out of state milk "an equal opportunity to compete" (p. 376 of 375 U. S.), the vitality of the *Lehigh* principle was affirmed. Furthermore, the Court there illustrated the principle by comparing subsection (5)(G)'s prohibition upon the power of the Secretary with the Commerce Clause limitation upon the states. It said (p. 379 of 375 U. S.):

> ". . . This provision, as the Court explained in *Lehigh Valley Coop. v. United States,* 370 U. S. 76, was intended to prevent the Secretary of Agriculture from setting up trade barriers to the importation of milk from other production areas in the United States. We seriously doubt that Congress, in denying the power to the Secretary, thereby granted it to the States."

The *Lehigh* principle is surely violated, and the power of the Secretary exceeded, when a milk order penalizes a plant for making some sales in the regulated market by providing, as a consequence, that it must also bear the exactions of the regulated market on the more substantial business it does in another market, where competing sellers are not required to suffer them. For a Class I plant like Lewes, which sells less than half its production in the regulated Maryland market, the order might as well say that, on what is sold in that area, it must pay into the area's producer settlement fund more than double the regulatory charge exacted from Class I plants dealing solely in the area. Certainly *Polar* would not permit the State of Maryland to regulate in this way and, under its illustration of the *Lehigh* principle, neither can the Secretary.

This barrier effect of full regulation of inter-market plants has been noted by the commentators. See Hutt, "Restrictions on the Free Movement of Fluid Milk under Federal Milk Marketing Orders," 37 U. Det. L. J. 525, 532 n. 27, 556 (1960). Publications of the Department of Agriculture have recognized it. See, *e.g.*, Marketing Research Report No. 98, Agricultural Marketing Service, U. S. D. A. (June 1955), pp. 52-54.[11] And throughout these proceedings the Secretary has described it as a "serious competitive disadvantage" (Appellants' App. 58a), which "could readily induce [a handler] to abandon his sales in the marketing area" (Appellants' App. 96a). See also Appellants' App. 59a-60a, 62a-63a, 191a-192a, 194a, 198a-201a, and 212a.

The Secretary's actions speak even more loudly. In some instances, the Secretary now seeks to minimize this barrier effect upon the inter-market plant by gerrymandering the regulated area, usually by expanding it to encompass what would otherwise be unregulated competition of regulated plants. For example, he based his inclusion of the Maryland Eastern Shore under this Order on the ground that, otherwise, Baltimore dealers would there suffer a "serious competitive disadvantage" from the competition of unregulated plants. Appellants' App. 191a.[12]

Furthermore, the Secretary has tied the Order's regulation to a plant basis rather than a company basis. This, of course, allows a handler large enough to have multiple

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11. In the past this was alleviated, at least on occasion, by confining regulation of outside plants to their sales in the regulated area. See *United States v. Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 565-67 (1939).

12. Of course, this is necessarily an imperfect solution which, if consistently pursued, would lead to uniform national regulation. But the Act specifically contemplates regional rather than national regulation, "unless the Secretary finds [as he has not] that the issuance of several orders applicable to the respective regional production areas or regional marketing areas . . . would not effectively carry out the declared policy of this chapter." 7 U. S. C. § 608c(11)(A); and see § 608c(11)(C).

plants to accommodate to the system by dedicating one or more plants to the regulated area without triggering regulation of all its business.[13]

2. *Prompt Adjudication of the Question Is Highly Important:* The Secretary reports that provisions similar to the ones here in issue "are contained in every federal milk marketing order now outstanding," so that "the effectiveness of federal milk marketing regulation not only in Maryland but across the country will be in jeopardy" if there is a trade barrier violation in this instance. See Supplemental Brief of Appellants, p. 4.[14] This turns upon whether the *Lehigh* principle does control, as Lewes urges, or the earlier Court of Appeals decision in *Titusville Dairy Products Co. v. Brannan,* 176 F. 2d 332 (3rd Cir. 1949), applies untouched, as the Secretary argues.

As a result, all who have commented have recognized the importance of a determination of the question. The Court of Appeals characterized it as "significant." Petition's App. 9a. The Secretary has said that the case "involves a question of great public interest" (Appellants' Opposition dated October 31, 1963, p. 2) and "presents issues of far-reaching consequence in the regulation of the dairy industry" (Appellants' Motion dated March 10, 1964, p. 2). The Amicus which supported the position of the Secretary in the Court of Appeals stated that a determination could "have an impact on the entire federal milk marketing order program throughout the country" (Motion of National Milk Producers Federation filed December 16, 1963, p. 2) and highlighted this in a brief under the caption

13. It has been observed that "[c]oncentration of power in a few large distributors has become an even greater problem today." Hutt, "Restrictions on the Free Movement of Fluid Milk under Federal Milk Marketing Orders," 37 U. Det. L. J. 525, 554 n. 115 (1960).

14. All briefs and papers described herein without reference to an appendix were filed with the Court of Appeals, and certified copies have been filed herewith.

"THE NATIONAL IMPORTANCE OF THE CASE" (Brief of Amicus Curiae p. 2).

This national interest is not only in a decision but in a prompt one. Although deferral of an adjudication for further administrative proceedings might not entail the five years that have passed in the case to date, the time that would be required to bring the case back to this stage would have to be substantial. So long as an adjudication is deferred, handlers such as Lewes must comply with the regulatory requirements. Enforcement against them is available under 7 U. S. C. § 608a(6) and is used, as it was here against Lewes, without regard to the validity of the regulation and without regard to the effect that compliance has upon the handler while he seeks an adjudication of the merits.

In the meantime, the same onus which Lewes is under continues to bear upon small dairies throughout the nation. In fact, the operations of the whole industry daily proceed in transactions which a decision of this substantive issue may require to be unscrambled.

3. *No Valid Legal Reason Requires Deferment of the Adjudication:*

(a) *The factual sufficiency of the record:* The decision of the Court of Appeals, ruling that the record evidence is insufficient, necessarily includes a determination that what is established of record does not disclose a prohibited trade barrier. Such a determination has to be based either upon a misconception of what this record is or upon a view of the trade barrier prohibition that departs from *Lehigh*.

In summary, the critical facts are simply that Lewes is a fluid milk plant which ships 45 to 35% of its production into the regulated Maryland area and yet does all its other business in Delaware. It is also shown, among other things, that Lewes does have competition in Delaware which is unregulated. In any event, these facts are all documented in the record (see p. 4, *supra*); they are not disputed by

other evidence; and they have never been questioned in argument.[15] The Milk Order itself does everything else by requiring, on the basis of these facts, that Lewes contribute to the Maryland fund on all its purchases.[16]

The opinion of the Court of Appeals does not say what additional facts are needed, and it is difficult to foresee what that Court expects Lewes to elicit in further proceedings before the Secretary.[17] Since the statute limits such proceedings to the question whether the Secretary's order is "in accordance with law" (7 U. S. C. § 608c(15)(A), and he so applies it (Appellants' App. 188a), they cannot relate merely to matters of discretion or policy. The Court of Appeals must therefore mean that legality here turns upon whether Lewes can make some demonstration of the actual competitive effect of the regulation upon its business by showing, for example, that its relative competitive position, in one market or another or both, has deteriorated or that some anti-competitive effect of an anti-trust variety has ensued.

Lehigh establishes, however, that the applicability of the trade barrier prohibition does not rest upon any showing of that kind. The opinion there does not recite a finding of what the invalid regulation's effect was upon the

15. Actually, the Secretary did not regard the case as suffering from some fact need, when it was in the District Court. There he had moved for summary judgment and proceeded with Lewes in presenting the case to the District Judge on the basis of adequate factual accord. And in the Court of Appeals, it was not until the last few pages of his reply brief that factual insufficiency was really urged. See Appellants' Reply Brief pp. 11-14.

16. Ironically, there is still no doubt about the critical facts in the companion enforcement case, where they are all shown in the reports which form the basis for there compelling Lewes to make the payments about which it complains in the review case.

17. In pointing out the effect of the Order, Lewes has argued that it is discouraged from the regulated area when, as a consequence of making sales there, it is subjected to burdens on its outside business where its competition is not required to bear them. However, it was referring only to the fact that the Order required it to pay something which the Order did not require outside competition to pay, and nothing more.

competitive position of the parties involved, or any competitive consequences of broader reach. Rather, it turns solely upon the nature of the regulation itself, which required the parties to pay a charge that was not geared merely to put the milk they sold in the regulated market on the same economic footing with other milk sold there but was, instead, fixed so that it could exact more.[18]

Actually, the Court went on to make it quite clear in *Lehigh* that it did not matter that there might be facts on which, in a given instance, the regulation operated to do no more than put the outside and inside milk on a competitive par, for it said in its opinion (p. 98 of 370 U. S.):

> ". . . Nor is the compensatory payment clause saved by the circumstance that in some instances it may also fortuitously operate to put the handlers of pool and non-pool milk on a competitive par. As has been pointed out (note 13, *supra*), there are other means available to the Secretary for achieving this result, while affording protection to pool producers, without imposing almost insuperable trade restrictions on the entry of nonpool milk into a marketing area."

(b) *The raising of the issue:* Although the Court of Appeals found that Lewes' administrative claims included the trade barrier point, the Secretary may here argue otherwise.[19]

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18. In *Lehigh*, the Court noted the record did "demonstrate" that the invalid regulation in fact caused the handler to incur a total cost that exceeded the Class I price for the milk it sold in the regulated market. 370 U. S. at p. 86. Here, the regulation inevitably causes Lewes to incur a total cost exceeding the Class I price for the milk it sells in the regulated market, since, in addition to incurring the Class I price on what it sells there, Lewes must at the very least always contribute to the Maryland fund a regulatory charge on all its purchases which are resold in another market.

19. Actually, the Court of Appeals' judgment directs a remand "for further administrative proceedings consistent with the opinion", which calls for the further development of facts. Petition's App. 12a. If such facts would be superfluous, the Court of Appeals' judgment can hardly be justified on some other basis.

The trade barrier issue was, however, covered by Lewes' administrative petition. Even the Secretary's attorneys characterized the petition's allegations, concerning "discriminatory interference with commerce in milk" (p. 6, *supra*), as charging that "[t]he order is in derogation of the policy of the Act and Commerce Clause of the Constitution, in that it interferes, unduly and unfairly and in a discriminatory manner with commerce in milk." Appellee's App. 19b-20b. In *Lehigh*, the Court ruled such allegations sufficient (p. 98 of 370 U. S.):

> ". . . The administrative petition filed with the Department of Ariculture alleged that the effect of the compensatory payment clause amounted 'to establishing tariffs or barriers interfering with the free flow of milk across state lines,' an obvious reference to the prohibition of § 8c(5)(G)."

A remand of this case to the Secretary would not, in any event, do credit to the exhaustion doctrine.[20] In the administrative proceedings, the Secretary was aware of the problem created by this Order's imposition of its regulatory exactions upon all the business of an inter-market plant.[21] In these review proceedings, the Secretary is a party and has unequivocally asserted that this feature of the Order

20. Actually, the issue here is not one whose prior administrative presentation is legally indispensable. The claim is "one to strike down an order [of the agency] made in excess of its delegated powers and contrary to a specific prohibition in the Act," which the courts can adjudicate in the first instance. *Leedom v. Kyne*, 358 U. S. 184, 188 (1958). Moreover, the decision in *Lehigh* comprised a development in the law between the administrative and judicial phases of the case which conventionally excuses the prior administrative assertion of substantive issues. *Hormel v. Helvering*, 312 U. S. 552 (1941); *cf. United States v. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952); and see Jaffe "The Exhaustion of Administrative Remedies," 12 Buffalo L. Rev. 327, 354-357 (1963).

21. The Secretary flatly argued to the District Court that, in the administrative proceedings, he "was not unmindful of the economic considerations regarding disposition of milk by regulated handlers outside the marketing area." Appellee's App. 39b.

is "in accordance with law" under *Titusville Dairy Products Co. v. Brannan*, 176 F. 2d 332 (3rd Cir. 1949), and is not touched by *Lehigh*, so that the agency position on the only relevant question has been made altogether clear.

The result, therefore, is a straightforward controversy about the interplay of a decision of this Court and of a Court of Appeals on a question of law having critical bearing upon the current system of federal regulation of an important industry.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES M. TUNNELL, JR.,
ANDREW B. KIRKPATRICK, JR.,
MORRIS, NICHOLS, ARSHT & TUNNELL,
3000 du Pont Building,
Wilmington, Delaware,
Attorneys for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14642

UNITED STATES OF AMERICA,
Appellant

v.

LEWES DAIRY, INC.

No. 14643

LEWES DAIRY, INC. AND CLIFFORD S. OTT AND JAMES M. FAULKNER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS HOLLYBROOK DAIRY, A CO-PARTNERSHIP

v.

ORVILLE L. FREEMAN, AS SECRETARY OF AGRICULTURE,
Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued April 24, 1964

Before KALODNER, FORMAN and SMITH, *Circuit Judges*

OPINION OF THE COURT

(Filed October 6, 1964)

By KALODNER, *Circuit Judge*

The United States instituted a proceeding in the District Court against Lewes Dairy, Inc., to enforce compli-

ance with the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, and of the Marketing Order (Order No. 127, later renumbered No. 16) regulating the handling of milk in the Upper Chesapeake Bay, Maryland marketing area (7 C.F.R. Part 1027).[1]

The District Court entered on May 21, 1963, an order requiring the defendant to pay into the registry of the court arrearages due under the Marketing Order for the period from February, 1960, to December, 1962, in the amount of $92,956.65, and also to pay into the registry of the court amounts currently due under the Marketing Order.

In the interim, Lewes Dairy, Inc., and Clifford S. Ott and James M. Faulkner, doing business as Hollybrook Dairy, a co-partnership, instituted proceedings in the District Court against the Secretary of Agriculture, pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 608c (15)(B), to review the denial of petitions for relief from Marketing Order No. 127 addressed to the Secretary pursuant to Section 608c (15)(A) of the Act.[2]

In this second proceeding, the District Court, on motions for summary judgment filed by the plaintiffs and by the Secretary, upon "Findings of Fact" and "Conclusions of Law", entered its order holding invalid Marketing Order No. 127 as it applied to the plaintiffs. The Secretary has appealed from this order, at our No. 14643.

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1. The Secretary officially promulgated the Order on December 31, 1959, 24 F.R. 11071. The Order became effective for reporting purposes on January 1, 1960, and for purposes of minimum price payments on February 1, 1960.

2. Mills Dairy Products Company and several other milk companies also filed petitions with the Secretary seeking administrative relief. From the denial of such relief, proceedings for judicial review were instituted in the United States District Court for the District of Maryland. The validity of marketing Order No. 127 was sustained: United States v. Mills, 315 F. 2d 828 (4 Cir. 1963), cert. denied *sub nom.* Willows Farms Dairy, Inc. v. Freeman, 374 U.S. 832.

The District Court, on July 16, 1963, entered an Order in the earlier enforcement proceeding so as to relieve Lewes Dairy, Inc. of the obligation of paying, as provided in its Order of May 21, 1963, the $92,956.65 arrearages into the registry of the court, pending appeal. The later Order provided that in the event this Court should reverse the District Court's Order in the review proceeding and remand for further administrative proceedings, the obligation to pay the arrearages should be deferred until sixty days after a final determination of the new proceeding.[3] The United States has appealed at our No. 14642 from this July 16, 1963 Order.

With respect to the review proceeding (appealed at No. 14643), which we take up first, the ultimate issue is whether the Milk Marketing Order involved establishes an economic trade barrier inconsistent with the provisions of Section 608c (5)(G)[4] of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 608c (5)(G). See Lehigh Valley Cooperative Farmers, Inc. v. United States, 370 U.S. 76 (1962). However, the Secretary preliminarily asserts that the issue was not developed in the administrative proceeding and therefore contends that the cause should be remanded for further administrative proceedings, unless, of course, this Court should determine

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3. It would appear that Hollybrook is no longer distributing milk in the Upper Chesapeake Bay Marketing Area, having sold the business during the course of this litigation. Proceeds of the sale were deposited in the District Court to cover a portion of Hollybrook's unpaid obligation under the Marketing Order. The purchasing company is complying with the Order. The District Court ordered the deposited funds retained in its registry pending the determination of the appeal in the "review" action. The United States has not appealed from this order entered in the enforcement action against Hollybrook.

4. "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

as a matter of law that the Milk Marketing Order is valid as applied. In this connection the Secretary contends that the District Court exceeded its authority in finding facts and in supplanting the Secretary in the exercise of functions initially committed to him.

Since we are in agreement with the preliminary assertion of the Secretary, an abbreviated statement of the underlying facts will suffice.

The background of milk regulation and the operation of a Milk Marketing Order are set forth in United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939). Reference to that decision saves repetition. Moreover, the particular Milk Marketing Order here involved is discussed in specific detail in United States v. Mills, 315 F. 2d 828, 831 (4th Cir. 1963), cert. den. *sub nom.* Willow Farms Dairy, Inc. v. Freeman, 374 U.S. 832, the relevance of which is made apparent by footnote 2, *supra.* Again, reference to that decision saves repetition.

Lewes Dairy, Inc. and Hollybrook Dairy are milk companies with plants located in Delaware but which market milk in the Upper Chesapeake Bay Marketing Area, the regulated area encompassed by Milk Marketing Order No. 127. Under that Order, sales of fluid milk within the marketing area, rather than plant location, determine whether a milk company is to be regulated. The sales of Lewes Dairy, Inc. and Hollybrook Dairy made them "pool plants" subject to full regulation under the Upper Chesapeake Bay Marketing Order. Lewes Dairy, Inc., Hollybrook Dairy, and others, refused to comply with the Milk Marketing Order (as a result of which the United States commenced the enforcement proceeding already referred to). The dairies jointly filed petitions with the Secretary seeking administrative relief on broadly stated claims. Upon denial, judicial review on equally broadly stated claims was sought below. However, between the denial of administrative relief by the Secretary of Agriculture and the commencement of the judicial review proceeding in

the court below, the United States Supreme Court handed down its decision in *Lehigh Valley*. The plaintiffs contend that they then merely "sharpened" their attack upon the validity of the Marketing Order in terms of that decision, which they also urge overruled, in effect, the decision of this Court in Titusville Dairy Products Co. v. Brannan, 176 F. 2d 332 (1949), cert. denied 338 U.S. 905.

The gravamen of Lewes Dairy's position in the court below rests upon the fact that it did a portion of its business outside the Upper Chesapeake Bay Marketing Area, in Delaware, where it was allegedly in competition with unregulated milk companies, which, according to Lewes Dairy, could obtain their milk supplies at lower cost than the minimum prices to which the Milk Marketing Order subjected Lewes Dairy on all its milk purchases. This, Lewes Dairy contends, gave its competitors an advantage. The Milk Marketing Order's provisions, it is not disputed, made Lewes Dairy a "fully regulated" company, even though some of its sales were not within the marketing area, so that it was required to pay minimum prices on all its milk purchases without regard to where its milk was sold. This, Lewes Dairy contends, created a "trade barrier" not permitted under Section 608c (5)(G), as interpreted by *Lehigh Valley*.

Motions for summary judgment were filed in the Court below first by the Secretary and then by Lewes Dairy. Without regard to other issues which had been raised before the Secretary and in the complaint for review in the District Court (as to which see *United States v. Mills, supra*) the District Court made "Findings of Fact" and stated "Conclusions of Law",[5] although the Secretary op-

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5. Relevant here are the following "Findings of Fact":

"6. Lewes disposes of more than 10% of its milk as Class I milk into the marketing area, and is thus a Handler as defined in the Order and is subject to the Order's price regulations.

7. Lewes sells all of its milk at a Class I utilization, and thus pays into the Producer-Settlement Fund the difference between

posed Lewes Dairy's motion on the grounds reasserted here insofar as the "trade barrier" issue is concerned.

(5 continued)
the established blend price and the Class I price designated in the Order.

8. Lewes disposes of between 35% and 45% of all its milk in the marketing area covered by Milk Order No. 16.

9. Under the Order, Lewes must contribute to the Producer-Settlement Fund, the Administrative Assessment Fund, and the Marketing Services Fund based not only on the 35%-45% of its total volume (that part shipped into the marketing area), but on 100% of its volume.

10. The requirement of Lewes to pay the difference between the blend price and the Class I price into the Producer-Settlement Fund on milk not shipped into the marketing area places it at a competitive disadvantage with non-regulated Handlers in Delaware (those who ship less than 10% of its milk into the marketing area).

11. Lewes Dairy is discouraged from shipping more than 10% of its milk into the marketing area since such volume of shipment subjects it to the full regulation and consequent competitive disadvantage in Delaware.

12. A requirement that Lewes Dairy contribute to the various funds only on the basis of the amount of Class I milk it actually ships into the marketing area would not put it at a competitive advantage over Handlers who ship all of their supply into the marketing area.

13. A requirement that Lewes Dairy contribute to the various funds only on the basis of the amount of Class I milk it actually ships into the marketing area would not destroy the purpose of the Order, which is to guarantee a uniform blend price to producers of milk finding its way into the geographical area which the Administrator *has chosen to regulate.*"

Relevant here are the following "Conclusions of Law"

"2. The above quoted section [§ 608c(5)(G)] prohibits the Secretary of Agriculture from setting up any kind of economic trade barrier through his marketing area price regulations. Lehigh Valley Co-operative Farmers, Inc. v. U.S., 370 U.S. 76, 97 (1962). In light of the *Lehigh Valley* decision, Titusville Dairy Products Co. v. Brannon, 176 F. 2d 332 (3d Cir. 1949) is not authority permitting regulation of milk prices on milk not sold in the marketing area.

3. Lewes Dairy is discouraged from shipping more than 10% of its milk into the marketing area since such volume of

In this instance, we have no hesitancy in concluding that the District Court's so-called "Findings of Fact" concerning the competitive effects of the Milk Marketing Order on the particular dairies here involved are unsupportable either as a proper exercise by the District Court of the summary judgment procedure under Rule 56, Federal Rules of Civil Procedure, or as a proper function of the District Court under the review procedure established by the Act pursuant to which this proceeding was commenced.[6] See United States v. Ruzicka, 329 U.S. 287 (1946).

(5 continued)

shipment subjects it to the full regulation and consequent competitive disadvantage in Delaware.

4. To the extent that Lewes is required to pay into the various funds on the basis of milk it does not dispose of in the marketing area chosen to be regulated by the Administrator, Order No. 16 imposes a trade barrier between Delaware and the marketing area.

5. Whether or not the question of the Order's imposition of a trade barrier was raised before or decided in the administrative proceeding below, justice requires that this question be decided in this review proceeding without remand for further administrative hearings.

6. Order No. 16 is not in accordance with law to the extent that it regulates prices to be paid by Handlers on milk not shipped into the defined marketing area."

The Court also made the findings and conclusions applicable to Hollybrook Dairy except to the extent of the percentage of Class I milk, over and above 10% previously delivered by Hollybrook Dairy into the marketing area.

6. 7 U.S.C. 608c(15).

"(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal

Without recounting the arguments of the parties on the "trade barrier" issue, we are satisfied that they are founded essentially upon factual assertions which are not evidentially developed in the record, or upon any determination of the facts made by the Secretary of Agriculture the correctness of which, when made, would be reviewed in this proceeding under § 608c (15)(B). As stated in United States v. Ruzicka, *supra,* 329 U.S., at 294:

> "It is suggested that Congress did not authorize a district court to enforce an order not 'in accordance with law.' The short answer to this rather dialectic point is that whether such an order is or is not in accordance with law is not a question that brings its own immediate answer, or even an answer which it is the familiar, everyday business of courts to find. Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of this ruling, and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts."

(6 continued)

place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. * * *"

We take the foregoing as expressing the spirit pervading these proceedings. Certainly the social and commercial significance of a Milk Marketing Order, and the legislative policy committing the initial determinations to the Secretary and limiting the judicial review, do not permit the courts to make initial findings of fact and to exercise the authority vested in the Secretary. Nor do we think that semantics or legal technicalities should be indulged in so as to frustrate achievement of intended justice.

In this case, the claims to invalidity, earlier stated, may be read broadly enough to include the "trade barrier" issue. Certainly the issue is significant, and is so regarded by the Secretary. As a legal proposition within the apparent or professed factual framework of this case, it is not one of simple solution to be decided upon abstractions or assumptions. And, whether our decision in *Titusville* is controlling, or (as held by the District Court) is overruled by *Lehigh Valley*, especially in view of the latter's differentiation of "fully regulated" milk companies (370 U.S. at 99), is not to be decided upon a record without evidence to sustain the factual realities of the legal arguments directed toward the issue brought into focus by the subsequent decision of importance (*Lehigh Valley*), upon which the Secretary has not had an opportunity to exercise his statutory powers and expertise.

Accordingly, we conclude that the Order of the District Court in the review proceedings (No. 14643) must be vacated and the cause remanded for further administrative consideration and disposition.

With respect to the enforcement proceedings (No. 14642), the United States has acceded to the May 21, 1963 Order that the arrearages under the Milk Marketing Order be paid into the registry of the court according to a schedule determined by the District Court following a hearing. However, it objects to the July 16, 1963 Order which, as already stated, relieved the defendant of its obligation to pay the arrearages pending appeal and, thereafter, pend-

ing determination of the further administrative proceedings which, pursuant to this Opinion, will ensue. Considering, as we must, the spirit of the specific provisions of the Act,[7] we agree that such protracted delay is not justified and that the challenged Order of the District Court staying payment of the arrearages as aforesaid must be vacated. Since the time for making payment as provided by the earlier Order of May 21, 1963 is past, the cause must be remanded to the District Court with instruction to direct expeditious payment of the arrearages into the registry of the Court.

For the reasons stated the Order of the District Court on appeal at our No. 14642 will be vacated and the cause remanded with instruction to direct expeditious payment of the arrearages into the registry of the Court, and its Order on appeal at our No. 14643 will be vacated and the cause remanded for further administrative proceedings consistent with this Opinion.

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7. 7 U.S.C. 608c(15)(B)

"* * * The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15)."

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,642.

UNITED STATES OF AMERICA,
Appellant,

v.

LEWES DAIRY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Present: KALODNER, FORMAN and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed July 16, 1963, in this case be, and the same is hereby vacated and the cause remanded with instruction to direct expeditious payment of the arrearages into the registry of that Court.

ATTEST: IDA O. CRESKOFF,

October 6, 1964. Clerk.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,643.

LEWES DAIRY, INC. AND CLIFFORD S. OTT AND JAMES M. FAULKNER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS HOLLYBROOK DAIRY, A CO-PARTNERSHIP

v.

ORVILLE L. FREEMAN, AS SECRETARY OF AGRICULTURE, *Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Present: KALODNER, FORMAN and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed July 12, 1963, in this case be, and the same is hereby vacated and the cause remanded for further administrative proceedings consistent with the opinion of this Court.

ATTEST: IDA O. CRESKOFF,

October 6, 1964. Clerk.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,642.

UNITED STATES OF AMERICA,
Appellant,

v.

LEWES DAIRY, INC.

No. 14,643.

LEWES DAIRY, INC., AND C. S. OTT ET AL.,
D/B/A HOLLYBROOK DAIRY

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE,
Appellant.

STIPULATION.

Counsel for appellants United States of America and the Secretary of Agriculture and for appellee Lewes Dairy, Inc. hereby stipulate that, if the Court will approve, this Court's mandates in these cases be stayed until November 13, 1964, and if by that date the Clerk of this Court shall have received a certificate from the Clerk of the United States District Court for the District of Delaware that Lewes Dairy, Inc. has filed with him a stipulation in its Civil Action No. 2191, in the form hereinafter prescribed, and has deposited in the Registry of that Court

the sum of $40,000, pursuant to the stipulation filed with him, the mandates herein will automatically be further stayed until November 25, 1964, and if by that latter date the Clerk of this Court shall have received a certificate from the Clerk of the United States Supreme Court that Lewes Dairy, Inc. has filed therein a petition for a writ of certiorari in these cases, with the required accompanying papers, the judgments herein will automatically be further stayed until the conclusion of such certiorari proceedings or until Lewes Dairy, Inc. fails to make payment into the Registry of the Delaware District Court as stipulated, and this Court is so advised by a writing of counsel for the United States, whichever is earlier.

The stipulation above referred to is that Lewes Dairy, Inc. shall deposit in the Registry of the United States District Court for the District of Delaware the sum of $92,956.65, which is referred to in paragraph 1 of the order of that District Court dated May 21, 1963, in its Civil Action No. 2191 (and which plaintiff in that action claims is the obligation of Lewes Dairy, Inc. to the producer settlement fund, the administrative assessment fund, and the marketing services fund under federal Milk Marketing Order No. 16 for milk received for the period beginning February 1960 to and including the month of December 1962), to be held in the Registry subject to the further order of the Court in its Civil Action No. 2191—all according to the following schedule:

1. An installment of $40,000 on such sum is to be so deposited by November 13, 1964;

2. An additional installment of $20,000 on such sum is to be so deposited by December 14, 1964; and,

3. A further installment of $10,000 on such sum is to be so deposited by January 14, 1965, and by the 14th day of each month thereafter until the total sum of $92,956.65 shall have been so deposited.

This stipulation is made with the understanding that Lewes Dairy, Inc. does not hereby admit any legal liability for the aforesaid sum and that the deposits hereby required will be made by it under protest. This stipulation is also made with the understanding that it is entered without prejudice to the right of either party hereafter to take such position as it wishes with regard to the right of Lewes Dairy, Inc. to withdraw interest that may be earned upon the aforesaid deposits after they are made.

/s/ ALEXANDER GREENFELD,
Attorney for Appellants.

MORRIS, NICHOLS, ARSHT & TUNNELL,
/s/ ANDREW B. KIRKPATRICK, JR.,
Attorneys for Appellee.

Date: November 13, 1964.

Present: FORMAN and SMITH, *Circuit Judges.*

SO ORDERED, BY THE COURT

/s/ WILLIAM F. SMITH,
Circuit Judge.

SECTION 8c OF THE ACT (7 U. S. C. § 608c)

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, and Connecticut, and not including fruits for canning or freezing other than olives, grapefruit, cherries, cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing), hops, honeybees and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin); *Provided,* That no order issued pursuant to

this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys), eggs (but not excepting turkey hatching eggs), fruits and vegetables for canning or freezing, and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the com-

modities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of subsections (6) and (7) of this section.

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjust-

ments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution

thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

(6) In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be repre-

sentative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the

equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products, in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or

which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding clause (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however,* That no action taken hereunder shall conflict with the Standard Containers Act of 1916 and the Standard Containers Act of 1928;

(I) Establishing or providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided,* That with respect to orders applicable to cherries such projects may provide for any form of marketing promotion including paid advertising.

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit for canning or freezing one or more representatives of processors of the commodity specified in such order.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this sec-

tion and necessary to effectuate the other provisions of such order.

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the

advertising of any commodity or product covered by such marketing agreement.

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the

producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

(13) (A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided*, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon

be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) (A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

(17) The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of

producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 717

LEWES DAIRY, INC., PETITIONER

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court in *United States* v. *Lewes Dairy, Inc.* (R. 32a)[1] is reported at 214 F. Supp. 616;[2] its opinion in *Lewes Dairy, Inc.* v. *Freeman* (R. 221a) is not reported. The opinion of the court of appeals covering both cases (Pet. App. 1a) is reported at 337 F. 2d 827.

[1] "R" refers to the separately bound appendix to the Government's brief filed in the Court of Appeals, nine copies of which petitioner has filed in this Court.

[2] *Sub nom. United States* v. *Ott, et al.*

JURISDICTION

The judgments of the court of appeals were entered on October 6, 1964 (Pet. App. 11a, 12a). The petition for a writ of certiorari was filed on November 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a district court action under 7 U.S.C. 608c(15) to determine whether a ruling of the Secretary of Agriculture made upon the record of an administrative proceeding before him was "in accordance with law," petitioner could challenge the validity of the Secretary's ruling upon a ground which it had not developed in the administrative proceedings before that official.

STATUTE INVOLVED

The Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, provides in pertinent part:

7 U.S.C. 608c(5)(G):

> No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area of the United States.

7 U.S.C. 608c(15):

> (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in ac-

cordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and

covering the same subject matter, instituted pursuant to this subsection.

STATEMENT

Pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, the Secretary of Agriculture promulgated an Order regulating the marketing of milk in the major portion of the State of Maryland. Under Milk Marketing Order No. 16 (formerly No. 127, R. 112a) companies selling substantial amounts of fluid milk in the "Upper Chesapeake Bay Milk Marketing Area" must pay specified minimum prices for all their raw milk supplies purchased from farmers. For practical regulatory reasons not challenged here, those minimum price payments are channeled through a "producer-settlement fund," the mechanics of which were explained and approved generally by this Court in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, as they were, with particular regard to the Marketing Order here in question, by the Fourth Circuit in *United States* v. *Mills*, 315 F. 2d 828, certiorari denied *sub nom. Willow Farms Dairy, Inc.* v. *Freeman*, 374 U.S. 832.

Petitioner is a milk company with a plant located in Delaware. However, it does a substantial portion of its business in the "Upper Chesapeake Bay Milk Marketing Area" and is subject to full regulation under the Order No. 16. Petitioner, however, refused to make the prescribed payments into the producer-settlement fund. Pursuant to 7 U.S.C. 608a(6), the government then obtained a court order to enforce petitioner's compliance. *United States* v. *Lewes Dairy, Inc.*, R. 32a.

In a separate proceeding, petitioner, together with the Mills Dairy Products Company of Maryland and others, filed a joint petition with the Secretary of Agriculture under 7 U.S.C. 608c(15)(A) in which it challenged the validity of the Marketing Order (R. 148a). After administrative hearings as provided in the Act, the Secretary rendered a tentative decision (R. 173a), and on June 14, 1961, a final decision (R. 210a), rejecting the joint challenge to the Marketing Order.

The milk companies sought judicial review of the Secretary's ruling in the judicial district where each had its principal place of business, as provided in 7 U.S.C. 608c(15)(B). Thus, petitioner brought suit in the United States District Court for the District of Delaware (*Lewes Dairy, Inc., et al.* v. *Freeman,* R. 213a), while the Mills Dairy Products Company commenced a separate action in the federal court in Maryland. The Maryland litigation was heard and decided first. On March 11, 1963, the Court of Appeals for the Fourth Circuit reversed a lower court decision and upheld Milk Marketing Order No. 16 as valid. *United States* v. *Mills,* 315 F. 2d 828, certiorari denied *sub nom. Willow Farms Dairy, Inc.* v. *Freeman,* 374 U.S. 832.

Thereafter, on May 20, 1963, Lewes Dairy, Inc., moved for summary judgment in its Delaware suit (R. 48a). Although it purported not to be abandoning the contentions it had jointly raised with Mills Dairy before the Secretary, petitioner rested its motion for summary judgment on a ground which had not been developed before the Secretary in the prior

administrative proceedings. Because it made a substantial portion of its milk sales within the Marketing Area, the Marketing Order subjected Lewes Dairy, Inc. to "full regulation." It was therefore required to pay farmers the minimum prices established under the Order on all its raw milk purchases from them, even though petitioner disposed of some of its milk in Delaware, outside the Marketing Area. In its motion for summary judgment, Lewes Dairy asserted that this requirement placed it at an economic disadvantage with those of its competitors who did business only in Delaware. Lewes alleged that those competitors are not subject to regulation and could purchase their milk supplies without paying the minimum prices established by the Marketing Order as Lewes was required to do. Lewes Dairy urged that "full regulation" as applied to it constituted a "trade barrier," impermissible under 7 U.S.C. 608c(5)(G) as interpreted by this Court in *Lehigh Valley Co-op.* v. *United States,* 370 U.S. 76. *Lehigh Valley* was decided by this Court on June 4, 1962, almost one full year *after* the final decision of the Secretary under review in the instant case.

The Secretary opposed Lewes Dairy's motion for summary judgment on the ground, *inter alia,* that the company had not raised the "trade barrier" issue in the administrative proceedings and that therefore he had never passed on the question as contemplated by the Agricultural Marketing Agreement Act, 7 U.S.C. 608c(15). Nevertheless, the district court ruled (R. 223a):

> Whether or not the question of the Order's imposition of a trade barrier was raised before or decided in the administrative proceeding below, justice requires that this question be decided in this review proceeding without remand for further administrative hearings.

The district court went on to grant summary judgment to Lewes Dairy, holding that "full regulation" of Lewes Dairy constituted a "trade barrier" which, in light of *Lehigh Valley Co-op.* v. *United States, supra,* was not permissible (R. 223a).

After the district court rejected the Secretary's motion to remand the cause to that official for his consideration of the "trade barrier" issue (R. 226a, 233a), the Secretary appealed to the United States Court of Appeals for the Third Circuit.[3] On October 6, 1964, relying upon this Court's decision in *United States* v. *Ruzicka,* 329 U.S. 287, the court of appeals ruled (emphasis added) (Pet. App. 3a–4a):

> [*T*]*he Secretary preliminarily asserts that the* [*trade barrier*] *issue was not developed in the administrative proceeding and therefore contends that the cause should be remanded for further administrative proceedings,* unless, of course, this Court should determine as a matter of law the Milk Marketing Order is valid as applied. In this connection the Secretary contends that the District Court exceeded its authority in finding facts and in supplanting the Secretary in the exercise of functions initially committed to him.

[3] The district court stayed the effect of its decision pending appeal (R. 46a).

> * * * [*W*]*e are in agreement with the preliminary assertion of the Secretary,* * * *.

In accordance with that opinion, the court entered judgments reversing the decisions of the district court and ordered the cause remanded for further administrative proceedings (Pet. App. 11a–12a).[4]

ARGUMENT

Petitioner seeks to challenge the validity of provisions contained in a Federal Milk Marketing Order. The basis of the challenge is such that, if sustained, it is very likely to have serious, adverse consequences on the nation-wide program of federal economic regulation pertaining to the dairy industry. The court of appeals reversed a district court judgment in petitioner's favor and remanded the cause to the Secretary of Agriculture for further administrative proceedings. The appellate court so ruled because petitioner had failed to develop before the Secretary the ground of challenge to the Marketing Order which it later asserted in the district court. The decision is plainly correct and there is no occasion for review by this Court at the present stage of the proceedings.

1. The court of appeals did not pass on the merits of petitioner's challenge to the Secretary's Marketing

[4] Pursuant to stipulation of the parties, the court of appeals stayed its mandates in both cases pending this Court's resolution of these proceedings on certiorari. In the interim, petitioner is making the payments currently due from it to the producer-settlement fund into the registry of the district court *pendente lite*, and is also paying into the registry its back due obligations under the Marketing Order in accordance with a schedule provided in the stipulation (Pet. App. 13a–15a).

Order. Rather, it remanded the cause to permit petitioner to seek a ruling on his complaint in the first instance from the Secretary of Agriculture, in accordance with the express procedure established by Congress in the Agricultural Marketing Agreement Act, 7 U.S.C. 608c(15)(A). If petitioner is not satisfied with the administrative decision of that official, judicial review will then be available to test whether the Secretary's ruling is "in accordance with law," 7 U.S.C. 608c(15)(B). The present interlocutory posture of the proceeding is sufficient reason in itself for denial of the petition for a writ of certiorari. *Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 257–258.

2. Moreover, the court's remand of this cause to the Secretary for further administrative proceedings was entirely correct. In *United States* v. *Ruzicka*, 329 U.S. 287, this Court held that a regulated milk company may not challenge the validity of a Marketing Order in court without first having exhausted the administrative remedies available to it before the Secretary of Agriculture under 7 U.S.C. 608c(15)(A). In explaining this exhaustion requirement, the Court stated (329 U.S. at 294):

> It is suggested that Congress did not authorize a district court to enforce an order not "in accordance with law." The short answer to this rather dialectic point is that whether such an order is or is not in accordance with law is not a question that brings its own immediate answer, or even an answer which it is the familiar, everyday business of courts to find. Congress has provided a special procedure for ascer-

> taining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of this ruling, and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts. * * *

In ordering the instant cause remanded to the Secretary, the court of appeals relied expressly upon *Ruzicka* (Pet. App. 8a–9a), and, at the same time, followed the uniform practice of the Circuits. *United States* v. *Yadkin Valley Dairy Co-op.*, 315 F. 2d 867 (C.A. 4); *Willow Farms Dairy, Inc.* v. *Benson*, 276 F. 2d 856 (C.A. 4); *United States* v. *Ideal Farms, Inc.*, 262 F. 2d 334 (C.A. 3); *Benson* v. *Schofield*, 236 F. 2d 719 (C.A.D.C.); *United States* v. *Turner Dairy Co.*, 166 F. 2d 1 (C.A. 7); *La Verne Co-op. Citrus Association* v. *United States*, 143 F. 2d 415 (C.A. 9). Any other course would have been erroneous. As the Court explained in *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 155:

> The responsibility of applying the statutory provisions to the facts of the particular case was given in the first instance to the Commission. A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore

> presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action. * * *

Further, because the effect of "full regulation" as it relates to this petitioner was not developed in the administrative proceedings, the Secretary had no occasion to explain the reason for instituting such a requirement. Since it was not open to counsel in the court of appeals to support the Secretary's decision with their own "*post hoc* rationalizations," *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168; *Securities and Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 196, remand was necessary not only to permit the Secretary to determine on the basis of his expertise whether "full regulation" of this petitioner is warranted, but also to obtain "the elucidation which he would presumably give to his ruling." *United States* v. *Ruzicka*, 329 U.S. 287, 294.

3. Remand might be inappropriate if petitioner's objections were so clearly meritorious that the outcome of further proceedings would be beyond doubt. But that is not the case. Petitioner's principal claim in this Court is that the decision of the court below conflicts with *Lehigh Valley Co-op.* v. *United States*, 370 U.S. 76.[5] However, it is apparent from the face of the *Lehigh* decision itself that no such conflict exists.

[5] The *Lehigh* decision was rendered *after* the Secretary's decision in these proceedings. This, of course, explains why the "trade barrier" issue, articulated so clearly in the petition and in the courts below, was not previously developed by petitioner in the administrative proceedings.

Lehigh Valley was concerned with an entirely distinct problem, to wit: whether the Secretary could require certain milk companies, not otherwise regulated by a Milk Marketing Order, to make "compensatory payments" into the producer-settlement fund established under the Order as a condition of doing business in a regulated Milk Marketing Area. The Court held that, under the conditions present in the *Lehigh* case, those compensatory payments constituted a "trade barrier" impermissible under 7 U.S.C. 608c(5)(G). No issue of compensatory payments is involved in this case. Rather, petitioner here challenges the authority of the Secretary to set minimum prices which it must pay for all its raw milk purchases from farmers when some of petitioner's sales are made outside the Marketing Area. Such "full regulation" is uniformly imposed on all companies doing a substantial business in the regulated market. As the Court itself recognized in *Lehigh Valley* (370 U.S. at 99):

> *Whether full regulation of the petitioners would be permissible under the Act is a question which we need not reach in this case.* If the Secretary chooses to impose such regulation as a consequence of a handler's introducing any milk into a marketing area, *the validity of such a provision would involve considerations different from those now before us.* [Emphasis supplied.] [6]

[6] *Polar Co.* v. *Andrews*, 375 U.S. 361, also cited by petitioner (Pet. 11), was concerned only with the regulation of milk marketing undertaken by the State of Florida. Federal marketing regulations were not involved and neither the United States nor the Secretary of Agriculture was party to the *Polar Co.* litigation.

Moreover, the only case to pass directly on this long-established regulatory practice held such "full regulation" entirely permissible under the Act. *Titusville Dairy Products Co.* v. *Brannan,* 176 F. 2d 332 (C.A. 3), certiorari denied, 338 U.S. 905. Thus no conflict exists which calls for resolution by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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